No. 95-1726

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE LABONTE, ALFRED LAWRENCE HUNNEWELL, DAVID E. PIPER AND STEPHEN DYER, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT GEORGE LaBONTE'S BRIEF IN OPPOSITION

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18 pp

QUESTION PRESENTED

WHETHER U.S.S.G. § 4B1.1 as interpreted by Amendment 506 to the Commentary, is a permissible construction of 28 U.S.C. § 994(h) which provides that categories of career offenders be sentenced, "at or near the maximum term authorized."

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Respondent George LaBonte requests that the Court deny the Government's Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the First Circuit. The opinion of the First Circuit is reported at 70 F.3d 1396.

OPINIONS BELOW

Petitioner's summary of the Opinions Below accurately sets forth the relevant lower court opinions except for the description of the District Court Order as denying George

LaBonte's Motion for Resentencing. (Petitioner's Brief at p. 2.) Mr. LaBonte's motion for resentencing was granted. App. 54a-66a.

STATEMENT OF THE CASE

In November of 1994, the United States Sentencing Commission's Amendment to Application Note 2 (Amendment 506) to the Career Offender Guideline § 4B1.1 became effective. Amendment 506 for the first time explicitly defined the phrase "Offense Statutory Maximum" as contained in U.S.S.G. § 4B1.1, as:

> the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or a controlled substance offense, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal records

U.S.S.G. § 4B1.1, comment (n.2) (Nov. 1994). In essence, the amendment sought to prevent an additional sentencing enhancement to be applied to a sentence already once multiplied due to a particular defendant's prior record. (*See* U.S.S.G., App. C, Amend. 506, at 409 (Nov. 1994) (where the Commission explained its interpretation as avoiding unwarranted double counting.) Pursuant to its authority under U.S.S.G. § 1B1.10(c) (Nov. 1994) the Commission specified that Amendment 506 be applied retroactively. It is significant to note that the proposed Amendment 506 was, prior to its effective date, first submitted

to Congress for comment. *See* 50 Fed. Reg. 23,608 (1994). Congress took no action to prevent the Amendment from taking effect.

George LaBonte, Respondent herein, sought resentencing in the United States District Court for the District of Maine pursuant to U.S.C. 3582(c)(2), based solely upon the new interpretation of 4B1.1 as clarified by Amendment 506. The District Court, Hornby, J., granted Mr. LaBonte's Motion for Resentencing specifically finding that the interpretation of 4B1.1 now espoused by the Sentencing Commission was a valid one which did not violate a federal statute. See App. 54a-66a.

One of the federal statutes against which Amendment 506 is measured is 28 U.S.C. § 995(h) which directs the Sentencing Commission to assure that the guidelines create a sentence, "at or near the maximum term authorized for categories of defendants...," that are over eighteen, have two prior felony drug trafficking crimes or crimes of violence, and have been convicted of an additional drug trafficking crime or crime of violence. 28 U.S.C. 994(h). However, 994(h) was not the only statute containing directives to the Sentencing Commission from Congress. A variety of factors to be considered by the Commission in setting guidelines sentences are set forth in 28

U.S.C. § 994(b)-(n). These include a directive that there be certainty and fairness in sentencing and that unwarranted sentence disparities be avoided, 28 U.S.C. 994(f), and a directive to the Commission to periodically review and revise the guidelines. 28 U.S.C. 994(o). In addition, 28 U.S.C. § 991(b)(1)(B), the enabling statute that created the sentencing guidelines, specifically directs that the Commission avoid, "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B).

The possibility of sentencing disparity for those convicted of the same criminal conduct in the context of the career offender guidelines lies in the discretion given prosecutors under 21 U.S.C. § 851(a)(1). Even if a defendant's prior criminal history would qualify him for the career offender enhancement, no such enhancement can even be considered unless the government chooses to list the prior convictions in an information giving notice that the enhancement will be sought. *See* 21 U.S.C. 851(a)(1); *Also see U.S. v. LaBonte*, 885 F. Supp. 19 (D. Me. 1995). App. 62a.

As a result of the District Court's granting of Mr. LaBonte's motion for resentencing, his sentence was modified from

the 188 months originally imposed down to 151 months. The government then appealed the district court's order granting Mr. LaBonte's motion for resentencing. The court of appeals affirmed the district court decision though on somewhat different grounds. Using the standard of review set out in *Chevron, USA Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984), the court of appeals examined the Sentencing Commission's interpretation of the guideline in light of whether such an interpretation was based on a permissible construction of the statute. App. 12a-13a. The approach taken by the court of appeals in performing this analysis was succinctly summarized in their opinion as follows:

> These appeals focus on a single sentence that appears in 28 U.S.C. § 994(h), a sentence that requires the Commission to adopt guidelines "that specify a sentence to a term of imprisonment at or near the maximum term authorized for [certain] categories of defendants." This problematic sentence presents three issues of statutory interpretation necessitating two distinct interpretations of the *Chevron* standard. The first application combines two issues; it concerns the explication of the word "maximum" as that word is used in Section 994(h) and, concomitantly, the meaning of the word "categories" as used therein. The second occasion for *Chevron* analysis involves an exegesis of the phrase "at or near" as used in the same sentence. The two problems are interrelated but they are somewhat different in nature.

App. 13a. The court then went on to undertake the analysis described above and found that the intent of Congress in defining the subject terms was unclear and, that the interpretation of the statute by the Sentencing Commission, as embodied in Amendment 506, was reasonable. In reaching this conclusion, the court found that the term "category of defendants," if given any meaning, clearly allowed the interpretation given by the commission.

> The statute explicitly refers to "categories of defendants," namely, repeat violent criminals and repeat drug offenders, and does not suggest that each individual offender must receive the highest sentence available against him. The Career Offender Guidelines, read through the prism of Amendment 506, adopts an entirely plausible version of the categorical approach that the statute suggests.

App. 19a. Finding, therefore, that the sentencing commission's interpretation was consistent with and not in violation of 994(h), the court of appeals affirmed the district court's modification of Mr. LaBonte's sentence from 188 to 151 months. App. 30a.

The government's subsequent petition for rehearing was denied by the original panel and a majority of the full court denied the government's request for rehearing *en banc*. App. 110a-111a. Judges Stahl and Lynch dissented. App. 112a-133a.

The government then filed the instant petition which was docketed on April 23, 1996.

ARGUMENT

Considerations relating to a grant of *certiorari* in the United States Supreme Court are set out in Rule 10 of the Supreme Court Rules. Though subsection (a)(i) of that Rule specifically lists a conflict between two United States Circuit Courts as a reason for granting *certiorari*, the initial paragraph of Rule 10 bears repeating.

Considerations Governing Review on Writ of Certiorari

> 1. A review on writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for writ of *certiorari* will be granted only when there are compelling reasons therefor, such as:
>
> (a)(i) When a United States court of appeals has rendered a decision on an important matter in conflict with the decision of another United States Court of Appeals on the same matter; or -

United States Supreme Court Rules, R. 10.

There is no dispute in the instant case that two courts of appeals have rendered decisions in conflict with two other courts of appeals on the same matter. The question, however, is whether the matter is important enough for this Court to grant

certiorari and hear this case and whether there are compelling reasons for doing so.

First, in the specific context, i.e. the individual case of George LaBonte, the fact remains that the total effect of the application of Amendment 506 to Mr. LaBonte's sentence was a reduction of that sentence from 188 months to 151 months, a change of only three years and one month out of a total original fifteen and one-half year sentence. Certainly such a modest reduction, which could also be brought about by something as minor as a future change in good time credits, is not such an important and compelling issue as to warrant full consideration by this nation's highest court.

On a broader level, the effect of Amendment 506 on sentences that would have been imposed based on the government's interpretation would in most instances be similar to the reduction received by Mr. LaBonte. For example, a seven level reduction in a defendant's offense level occasioned by using five years as the offense statutory maximum rather than ten years because of the statutory enhancement, would lower a sentence by no more than 49 months for a defendant with a criminal history category of VI. *See* U.S.S.G. § 4B1.1. Again, a four year sentence reduction does not rise to the level of a compelling and

important issue requiring the United States Supreme Court's attention.

The other issue worth examining is whether the circuit split on this issue will have a dramatic negative impact in the future. This analysis should take into account the number of defendants who will be found with circumstances warranting the application of Amendment 506. The type of defendant who is eligible for the 4B1.1 enhancement is one that is eighteen years or older, has two prior felony convictions involving narcotics or violent crimes, and the instant offense of conviction is an offense involving narcotics or a violent crime. Given these parameters, it is likely that even the possibility of a sentencing enhancement under § 4B1.1 will only apply to a small percentage of all persons convicted of federal crimes in 1995. Since the Amendment in question can only pertain to a small percentage of defendants, the issue may not be one, even on a nationwide scale, that justifies the granting of *certiorari*.

Finally, due to the nature of the issue, it is also entirely possible that certain developments over time may resolve the split of viewpoints without Supreme Court intervention. Additional commentary by the Sentencing Commission may convince other circuits that the Amendment, and the First Circuit's

interpretation of it, are indeed valid. More importantly, Congress can at any time pass legislation which could definitively resolve the issue at bar either endorsing the commission's interpretation or specifically rejecting it.

CONCLUSION

For the reasons set forth above, Respondent George LaBonte respectfully requests that the petition for a writ of certiorari of the United States be denied.

Respectfully submitted,

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May 22, 1996

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ON PETITION FOR A WRIT OF CERTIORARI
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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **MOTION OF RESPONDENT GEORGE LABONTE TO PROCEED IN FORMA PAUPERIS** by first class mail, postage prepaid, on this 22nd day of May, 1996.

SEE ATTACHED LIST

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May 22, 1996

VIA EXPRESS MAIL

Office of the Clerk
United States Supreme Court
Room 30
One First Street, NE
Washington, D.C. 20543

Re: *United States of America, Petitioner v. George LaBonte, et al., Respondent*, No. 95-1726

Dear Sir:

Please find enclosed for filing one original and ten copies of Respondent George LaBonte's Brief in Opposition; one original and ten copies of Respondent George LaBonte's Motion to Proceed In Forma Pauperis, which are each attached to the Briefs as required by Rule 39(2); and duly executed Certificates of Service for the Brief and for the Motion.

Thank you for your assistance in this regard.

Very truly yours,

John A. Ciraldo

JAC/lca
Enclosures

cc: Drew Days, III, Solicitor General (w/enc.)
Michael Bourbeau, Esquire (w/enc.)
Cloud Miller, Esquire (w/enc.)
Peter Clifford, Esquire (w/enc.)

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